

INDEX

	Page
Opinion below.....	1
Jurisdiction.....	2
Questions presented.....	2
Statutes involved.....	2
Statement.....	4
Argument.....	4
Conclusion.....	12
Appendix.....	13

CITATIONS

Cases:

<i>Albertson v. Subversive Activities Control Board</i> , No. 3, this Term, decided November 15, 1965.....	2, 5, 6
<i>American Communications Association v. Douds</i> , 339 U.S. 382.....	6
<i>Brown v. United States</i> , 348 F. 2d 661, certiorari denied, 382 U.S. 904.....	11
<i>Crooker v. California</i> , 357 U.S. 433.....	12
<i>Escobedo v. Illinois</i> , 378 U.S. 478.....	11, 12
<i>Lawson v. United States</i> , 248 F. 2d, 654 certiorari denied, 355 U.S. 963.....	11
<i>Lee v. United States</i> , 322 F. 2d 770.....	12
<i>Lewis v. United States</i> , 348 U.S. 419.....	2, 5, 6
<i>Lottery Case</i> , 188 U.S. 321.....	7
<i>Noto v. United States</i> , 367 U.S. 290.....	6
<i>On Lee v. United States</i> , 343 U.S. 747.....	11
<i>Massiah v. United States</i> , 377 U.S. 201.....	11, 12
<i>State v. Nunes</i> , 205 A. 2d 24.....	7
<i>Stovall, United States ex rel. v. Denno</i> , C.A. 2 decision unreported (1965).....	11

Cases—Continued

	Page
<i>United States v. Brown</i> , 381 U.S. 437.....	6
<i>United States v. Calamaro</i> , 354 U.S. 351.....	6
<i>United States v. Indiviglio</i> , 352 F. 2d 276, petition for certiorari pending, No. 821, this Term.....	11
<i>United States v. Kahriger</i> , 345 U.S. 22.....	2, 4, 5, 6
<i>United States v. Ladson</i> , 294 F. 2d 535, certi- orari denied, 369 U.S. 824.....	11
<i>United States v. Marzano</i> , 149 F. 2d 923.....	7
<i>United States v. Sullivan</i> , 274 U.S. 259.....	4, 5
<i>United States v. Zizzo</i> , 338 F. 2d 577, certiorari denied; 381 U.S. 915.....	5

Statutes and rule:

18 U.S.C. 1952.....	5
26 U.S.C. 4411.....	2, 4
26 U.S.C. 4412.....	2, 3, 4
26 U.S.C. 7023.....	4
Conn. Gen. Stat., 1958 Rev., §§ 53-271 to 53- 279, 53-295 to 53-297.....	7
Rule 52(b), F.R. Crim. P.....	12

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 823

JAMES MARCHETTI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 826

FRANK COSTELLO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1028 Misc.

ARTHUR GJANCI, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. J. App. 1a-15a) is reported at 352 F. 2d 848.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1965. Petitions for rehearing were denied on November 26, 1965. Petitions for writs of certiorari were filed by Marchetti (No. 823) on December 15, 1965, by Costello (No. 826) on December 16, 1965, and by Gjanci (No. 1028 Misc.) on December 18, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether this Court should reexamine, in light of *Alberson v. Subversive Activities Control Board*, No. 3, this Term, decided November 15, 1965, its holdings in *United States v. Kahriger*, 345 U.S. 22, and *Lewis v. United States*, 348 U.S. 419, that the registration requirement of 26 U.S.C. 4412 does not violate the Fifth Amendment privilege against self-incrimination.
2. Whether this Court should reexamine its holding in *Kahriger* that the wagering tax provisions do not violate the Tenth Amendment.
3. Whether petitioners were entitled to a new trial because of pretrial publicity generated by their arrests.
4. Whether the questioning of petitioners Marchetti and Gjanci immediately after their arrest violated their Sixth Amendment right to counsel.

STATUTES INVOLVED

26 U.S.C. 4411:

Imposition of tax.

There shall be imposed a special tax of \$50 per year to be paid by each person who is

liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

26 U.S.C. 4412:

Registration

(a) Requirement.

Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company.

Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.

In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

STATEMENT

Petitioners were convicted on separate two-count indictments which charged each of them with violating 26 U.S.C. 7203 by willfully failing to purchase the occupational wagering-tax stamp required by 26 U.S.C. 4411 and by willfully failing to register as required by 26 U.S.C. 4412. Petitioners were also convicted on an indictment charging all of them with conspiring to fail to purchase the necessary stamp. All three petitioners received concurrent one-year prison sentences on the first count of their substantive indictments and on the conspiracy indictment. Costello and Marchetti were fined \$10,000, and Gjanci was fined \$2,500. Imposition of sentence on the second count of each substantive indictment was suspended and petitioners were placed on probation for two years. The court of appeals unanimously affirmed the convictions.

ARGUMENT

1. Petitioners' initial contention is that they were constitutionally privileged not to comply with 26 U.S.C. 4412 because that registration provision required them to submit self-incriminatory information on the prescribed Internal Revenue Form (p. 13, *infra*). This Court rejected the identical claim in *United States v. Kahriger*, 345 U.S. 22, on the grounds that (1) the privilege claim could not first be made in a criminal prosecution for failure to register (see *United States v. Sullivan*, 274 U.S. 259), and (2) the registration provision did not require a registrant "to confess to acts already committed" but merely in-

formed him "that in order to engage in the business of wagering in the future he must fulfill certain conditions." 345 U.S. at 32-33. The holding in *Kahriger* was reaffirmed in *Lewis v. United States*, 348 U.S. 419, a case arising in the District of Columbia, where the petitioner contended that the disclosure required by the statute would incriminate him with respect to federal offenses, not merely State crimes.¹

Albertson v. Subversive Activities Control Board, No. 3, this Term, decided November 15, 1965, does not require reexamination of *Kahriger* and *Lewis*. In distinguishing the *Albertson* situation from that in *United States v. Sullivan*, 274 U.S. 259, this Court observed that "to honor the claim of privilege not asserted at the time the return was due would make the taxpayer rather than a tribunal the final arbiter of the merits of the claim" (*Albertson* slip opinion, pp. 8-9). It also noted that in *Sullivan* the privilege claim was "asserted in an essentially non-criminal and regulatory area of inquiry" (*id.* at p. 9). These distinctions apply to *Kahriger*, *Lewis* and the present cases as well as to *Sullivan*. The Court characterized the wagering-tax registration provisions in *Kahriger* as "directly and intimately related to the collection of the tax and * * * 'obviously supportable as in aid of a revenue purpose'" (345 U.S. at 31-32), and that distinguishes them from the individual registra-

¹ This Court also denied certiorari recently in a case in which a defendant's wagering-tax returns were introduced into evidence against him in a prosecution for violation of 18 U.S.C. 1952 (travel in interstate commerce with intent to carry on gambling activity). *United States v. Zizzo*, 338 F. 2d 577 (C.A. 7), certiorari denied, 381 U.S. 915.

tion requirement of the Subversive Activities Control Act—which, in light of the underlying determination of the Subversive Activities Control Board, would have served little, if any, purpose other than self-incrimination “in an area permeated with criminal statutes” (*Albertson* slip opinion, p. 9).

An additional distinction between these cases and *Albertson* (which was not, however, explicitly mentioned in the *Albertson* opinion) arises from the fact that the registration in *Albertson* touched incidentally upon constitutionally protected rights of association. Since membership in the Communist Party without knowledge of its unlawful purposes or intent to further them is constitutionally protected (see *American Communications Association v. Douds*, 339 U.S. 382, 393; *Noto v. United States*, 367 U.S. 290, 299–300; *United States v. Brown*, 381 U.S. 437, 455–456), compulsory disclosure of membership—with its hazard of prosecution—might deter lawful association. No such countervailing interest is involved when the disclosure pertains not to speech or association but to gambling. See *Lewis v. United States*, 348 U.S. 419, 423.

2. The claim that the wagering-tax provisions violate the Tenth Amendment was also squarely rejected in *Kahriger*. In *United States v. Calamaro*, 354 U.S. 351, 358, on which petitioners rely, the Court observed only that the policy of deterring gambling was essentially one of State concern and could not be invoked as a basis for extending the federal statute beyond its literal application. Neither *Calamaro* nor any other decision of this Court provides any support for petitioners' claim that the

personal motives of federal officials engaged in non-discriminatory enforcement of a federal statute may invalidate, under the Tenth Amendment, an otherwise lawful federal conviction.² Moreover, since State law prohibits the conduct in which petitioners were engaged (see Conn. Gen. Stat. §§ 53-271 to 53-279, 53-295 to 53-297), enforcement of the federal law did not conflict with a power reserved to the State of Connecticut by the Tenth Amendment; it merely "supplemented the action of" the State in forbidding commercialized gambling. Compare *Lottery Case*, 188 U.S. 321, 357.

3. Petitioners were indicted with thirty-five others in New Haven, Connecticut, on October 6, 1964. Bench warrants were issued and bail was fixed, but the indictments were sealed until further order of the court (App. C.A. 203a). The indictments were unsealed at 2:36 p.m. on October 8. At 1:20 p.m. on that date, those indicted, as well as certain other individuals charged by complaint, were arrested in

² Similarly, as the court of appeals held in a connected case (Pet. J. App. 23a), the trial judge did not exceed proper discretion by taking into account petitioners' violation of State gambling laws in imposing sentences which were within the permissible maximum for the misdemeanor charged. Marchetti's suggestion (Pet. 18-19) that reversal of the convictions is required by the judge's remarks in imposing sentence and his post-trial statement concerning the need for more effective law enforcement (App. C.A. 177a-186a) is unsound. The record discloses no conduct on his part prejudicial to petitioners during trial (compare *United States v. Marzano*, 149 F. 2d 923, 925-926 (C.A. 2)), and no post-trial remarks questioning the justice of prior acquittals from which an inference could arise that his trial conduct was motivated by personal animus against them (compare *State v. Nunes*, 205 A. 2d 24, 27 (R. I.)).

simultaneous raids conducted by 75 Treasury agents aided by 50 State policemen. A press release announcing the arrests was issued by the government prior to the unsealing of the indictments (App. C.A. 70a-72a). The release stated that the arrests "were successful in breaking up a large, syndicated operation including some of the most important higher-ups in the gambling syndicate," and that the "series of raids was part of the National crackdown on organized crime initiated by the Office of the United States Attorney General" (App. C.A. 70a). Petitioners, who were the only ones charged with conspiracy as well as with substantive violations, were specifically mentioned by name in the release (App. C.A. 71a).³ Newsmen were invited to Internal Revenue Headquarters to photograph those arrested as they were brought into custody, and the arrests resulted in extensive newspaper, radio and television coverage, particularly in Bridgeport, the area in which the raids had taken place (Pet. J. App. 8a; see App. C.A. 144a-147a). On the following days, the Bridgeport newspapers reported oral statements by the chief assistant United States attorney to the effect that the raids had "broken the back of gambling" in Bridgeport, that funds from gambling were supporting other illegal activities, that housewives had called to express their gratitude, and that Costello and Marchetti had previous convictions for income tax violations (Pet. J. App. 8a; see App. C.A. 148a-161a).

³ Costello and Marchetti, along with John Mento, received an additional mention because their bonds were set at higher amounts than were the bonds of the other persons arrested.

Petitioners were arraigned in New Haven on October 20. Costello and Gjanci requested jury trial in Bridgeport (App. C.A. 2a, 207a), and Marchetti registered no objection to being tried there. On December 3, the first day of actual trial, petitioners brought to the court's attention an article which had appeared in a Bridgeport newspaper on December 1, reporting that six suspected gamblers had submitted guilty pleas and that the chief Assistant United States Attorney anticipated that others would also so plead (Pet. J. App. 9a; see App. C.A. 141a). On this basis Costello moved for a mistrial (App. C.A. 208a), and Marchetti and Gjanci for a mistrial and a change of venue (App. C.A. 211a-212a). At the request of the government (App. C.A. 214a) and with petitioners' consent (App. C.A. 215a), the court inquired whether any juror had read the article, and received no response (App. C.A. 216a).⁴ The motions were thereupon denied (App. C.A. 217a).

Since petitioners failed, prior to trial, to move either for a change of venue or a continuance, and, indeed, affirmatively requested trial in Bridgeport (other than Marchetti, who acquiesced)—where the arrests had taken place and where the pretrial publicity was strongest—they effectively waived any objection which they may have had to such publicity. As the court of appeals held, "counsel could not

⁴The court also indicated a willingness, if any counsel so requested, to poll the jurors individually, stating that "[i]n the absence of request, the Court will assume that the jurors' silence in response to the inquiry that I put to them is satisfactory to counsel on both sides." There was no request for an individual poll (App. C.A. 217a).

speculate on a favorable verdict and then claim lack of 'an impartial jury' when the gamble failed" (Pet. J. App. 9a). Marchetti's and Gjanci's belated oral motions for change of venue were based upon a single newspaper story which appeared after the jury had been selected. The court inquired regarding the effect of that story and concluded that it had not been read by any of the jurors and that it did not, in any event, pertain to any of the petitioners personally.

4. Marchetti was arrested in the diner which he owned (App. C.A. 272a), and he was then advised "of his constitutional rights." The arresting agent took him to a booth in the dining portion of the diner and interviewed him over a four-hour period (App. C.A. 271a, 288a). Marchetti admitted knowledge of the wagering-tax stamp requirement but said that nobody buys them and "I pay enough" (App. C.A. 272a). He also claimed that he did not work for anyone, but "took all the action himself" (*ibid.*). In his presence, his answers were recorded on an interview sheet which he reviewed and signed (*ibid.*; see App. C.A. 143a). At petitioners' trial, the agent's testimony regarding the conversation was introduced without objection, and the interview sheet was similarly admitted into evidence against Marchetti only (App. C.A. 273a).

Upon Gjanci's arrest, he was also warned of his right not to answer incriminating questions, and was then asked if he had purchased a wagering-tax stamp. He replied that he had not. He was then asked why, and he replied that he did not accept wagers but merely played the numbers himself. This testimony

was also received without objection (Pet. J. App. 14a-15a).

By failing to object when their statements were offered in evidence, thereby giving the judge no "opportunity to correct the error and thus avoid the necessity of further proceedings, possibly including a new trial," petitioners waived their right to raise the objection on appeal and in this Court. *United States v. Indiviglio*, 352 F. 2d 276, 280 (C.A. 2), petition for certiorari pending, No. 821, this Term;⁵ see also *On Lee v. United States*, 343 U.S. 747, 749, n. 3; *United States v. Brown*, 348 F. 2d 661 (C.A. 2), certiorari denied, 382 U.S. 904; *Lawson v. United States*, 248 F. 2d 654 (C.A.D.C.), certiorari denied, 355 U.S. 963; *United States v. Ladson*, 294 F. 2d 535, 538-539 (C.A. 2), certiorari denied, 369 U.S. 824. As with their contentions in regard to the allegedly prejudicial publicity, petitioners cannot "speculate on a favorable verdict and then claim [error] when the gamble failed" (see Pet. J. App. 9a).

In any event, the circumstances here are very different from those involved in *Massiah v. United States*, 377 U.S. 201, and in *Escobedo v. Illinois*, 378 U.S. 478. The interviews of these petitioners involved no overreaching by government agents nor any efforts to trick unwary defendants or to obtain admissions from inexperienced suspects which the presence of

⁵ Marchetti claims a conflict between *Indiviglio* (which was decided *en banc*) and a panel decision of the same court in *United States ex rel. Stovall v. Denno*, decision unreported (1965). *Stovall* has, however, been set down for rehearing *en banc*.

counsel would have prevented. The questioning was not surreptitious, as in *Massiah* (see 377 U.S. at 206); it took place on the premises where the arrests were made and not in the interrogation room at the jailhouse, as in *Escobedo* (compare also *Lee v. United States*, 322 F. 2d 770, 772 (C.A. 5)). Unlike *Escobedo*, petitioners were warned of their right to remain silent, and they did not request the assistance of counsel (see 378 U.S. at 491). Petitioners were, like the defendant in *Crooker v. California*, 357 U.S. 433, experienced and aware of their rights. Nor did they, when questioned, plead guilty or confess. Gjanci's statement was exculpatory, and Marchetti's constituted an effort to shield Costello. In these circumstances, the questioning of Marchetti and Gjanci cannot be deemed so unfair that it was necessary for the trial judge to exclude their statements notwithstanding the failure to object or for the court of appeals to treat their admission as "plain error" within the meaning of Rule 52(b), F.R. Crim. P.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, Jr.,
Assistant Attorney General.

BEATRICE ROSENBERG,
MARSHALL TAMOR GOLDING,
Attorneys.

JANUARY 1966.

APPENDIX

FORM 11-C
Rev. Mar. 1938

U. S. Treasury Department—Internal Revenue Service
SPECIAL TAX RETURN AND APPLICATION FOR REGISTRY—WAGERING
(See instructions on reverse for time and place for filing return)

Return for period from _____

(Month, day, and year)

to June 30, 19____.

1. Name: True name _____

Alias, style, or trade
name, if any _____

2. Address: Residence _____
(Number and street)

(City) (County) (State)
Business _____
(Number and street)

(City) (County) (State)

3. If this is merely an application for registry with which no remittance of tax is required, please explain and give your Special Tax Stamp No. and Registration No. (see instruction 2)

4. If taxpayer is a firm, partnership, or corporation, give true name of members or officers.
(If additional space is required for items 4, 5 (a), 5 (b), 5 (c), or 6, attach additional sheet, identifying each entry as to item number.)

True name _____

Title _____

Home address _____

5. Are you engaged in the business of accepting wagers on your own account? ☐ Yes ☐ No
If yes, complete (a), (b), and (c) of this item.
(Check one)

(a) Name and address where each such business is conducted.

Name of location _____

Street address _____

City and State _____

(b) Number of employees and/or agents engaged in receiving wagers on your behalf

(c) True name, current address, and special tax stamp number of each such person.

True name _____

Special stamp No. in present use _____

Street address _____

City and State _____

I. Do you receive wagers for or on behalf of some other person or persons? ☐ Yes ☐ No
(Check one)

If yes, give true name and address of each such person.

True name _____

Street address _____

City and State _____

SIGNATURE AND VERIFICATION

I declare under the penalties of perjury that this return and/or application (including any accompanying statements or lists) has been examined by me and to the best of my knowledge and belief is true, correct, and complete.

(Date) _____ 19____

(Signature) _____

State whether individual person, member of firm,
or if corporate officer, give title _____

For District Director's Use Only

(Stamp received) _____

(Date issued) _____

(Registration number) _____

Tax \$ _____

Penalty \$ _____

Interest \$ _____

Total \$ _____

Make remittance payable to the Internal Revenue Service. Payment may be made by cash, check or money order.